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THE NATURE OF THE JUDICIAL PROCESS AND JUDICIAL DISCRETION

RUSSELL F. PANNIER†

The nature of the judicial process and judicial discretion are issues that traditionally have polarized legal philosophers. In this Article Professor Pannier analyzes these issues through an examination of the theories advanced by the positivists and Ronald Dworkin. Professor Pannier raises objections to these theories and proposes a natural law theory of adjudication.

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I. INTRODUCTION

H.L.A. Hart has argued that American jurisprudential thought regarding the nature of the adjudicative process historically has tended to polarize into two extremes, the "Nightmare" and the "Noble Dream."¹ These two approaches differ primarily in their treatments of the issue of judicial discretion.

In the Nightmare theory of adjudication, the judicial function is understood as primarily legislative in nature. Judges do not discover preexisting rights or apply existing rules of law; rather, they create rules and rights in the very process of adjudication. The central feature of a mature legal system is the presence of judicial discretion. No ascertainable constraints are imposed by a system of preexisting rules that define rights and duties in a logically coercive way.²

In contrast, in the Noble Dream theory, courts resolve cases by appealing to preexisting rights that are defined by preexisting

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1. See Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

2. See *id.* at 972-78.

rules.³ Courts do not create law; they discover it. The central feature of a legal system is the existence of a set of abstract rules whose application, given the facts of a particular case, is a matter of deductive logic. More precisely, a legal system is defined as a set of rules with the following properties: a finite number of basic rules, a consensus among competent participants in the legal order as to the identity and content of the basic rules, consistency in the sense that contradictions cannot be deductively derived from the rules, completeness in the sense that the rules generate for any legal question a determinate answer upon which competent participants will agree, and applicability by means of a decision procedure that invariably terminates with a unique solution in a finite number of steps and is rational in the sense that competent participants agree as to how the procedure should be applied in any particular instance.⁴

Each extreme contains certain commonly-held assumptions about the nature of adjudication. Perhaps it is our reluctance to abandon any of these assumptions that accounts for our tendency to vacillate between the competing theories of law. The Nightmare theory incorporates at least the following assumptions: that in some sense courts are a primary, and rules a secondary and derivative, phenomenon; that the moral frameworks of individual judges play an inevitable role in adjudication; and that no mechanical decision procedure exists for rationally adjudicating legal disputes. On the other hand, the Noble Dream is grounded upon the assumptions that adjudication is ideally a principled process, free of arbitrary discretion; that legal conclusions are rationally objective, in that a consensus of informed participants ideally is attainable; and that in some sense courts declare existing rights and rules. A jurisprudence adequate to the phenomena would articulate a theory incorporating the valid aspects of all of these assumptions.

II. DWORKIN'S THEORY OF ADJUDICATION

In his widely-discussed book, *Taking Rights Seriously*,⁵ Ronald Dworkin has attempted such a synthesis. I shall briefly set out the

3. See *id.* at 978.

4. I do not suggest that this kind of formulation can be found in any of the classical proponents of this tradition. I propose it only as one way of explicating the conception. For an elementary discussion of the concept of a finitary decision procedure, see S. KLEENE, *MATHEMATICAL LOGIC* § 40 (1967).

5. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

main outlines of his theory, state what I believe to be some of its weaknesses, and contrast the theory with an analysis based upon a natural law conception of legal reasoning. I shall argue that although Dworkin's theory of adjudication incorporates many insights and sheds much light on the legal process, a teleological analysis provides a more adequate account.

Dworkin summarily rejects the Noble Dream theory of law, which he refers to as "mechanical jurisprudence," arguing that it cannot account either for evolutionary change in the common law or for the fact that judicial decisions are often controversial within the legal community.⁶ For Dworkin, the opposite end of the jurisprudential spectrum is occupied by positivism, which he takes to have been definitively formulated and defended by H.L.A. Hart.⁷ According to Dworkin, the theory of positivism holds that persons have legal rights only insofar as enforceable rights have been created either by "explicit political decisions or by explicit social practices."⁸ More particularly, Dworkin believes that the positivist makes the following assumptions:⁹ First, a legal system is a set of special rules that a society uses to direct human conduct by means of coercive public power. These rules are identifiable by certain formal criteria articulable in a "rule of recognition." The criteria are formal in that they are not concerned with the content of rules but with the manner in which rules are adopted by a society. With a rule of recognition, a social order's legal rules can be distinguished from those social rules that are not enforced with coercive public power. Second, this class of valid legal rules exhausts the system of law in the sense that if a particular case is not clearly covered by one of the rules, then the dispute simply cannot be resolved by "applying the law." Instead, it must be resolved by an act of judicial discretion, that is, by a court's reaching beyond the body of legal rules for an extra-legal standard or premise. Third, one has a legal obligation if and only if one's situation falls under some valid legal rule requiring one to do or to forbear from doing something. In the absence of an applicable legal rule no legal obligation exists. Thus, when a court resolves an issue by exercising judicial discretion it is not enforcing any legal rights at all.

6. *See id.* at 16.

7. *See* H. HART, *THE CONCEPT OF LAW* (1961).

8. R. DWORKIN, *supra* note 5, at xii.

9. *See id.* at 17.

Dworkin argues that positivism entails claims about the nature of adjudication that contradict the informed intuitions of lawyers. For example, he believes positivism to be committed to the claim that in a "hard case," that is, a case to which no settled rule applies, a court does not discover preexisting rights or duties, but creates rights and duties out of its own moral sense. In other words, in hard cases courts engage in *ex post facto* legislation, rather than in the enforcement of existing rights and duties. Dworkin thinks that this implication conflicts with our legal intuitions and would be justifiably regarded as morally outrageous by the losing parties in hard cases.¹⁰

Dworkin's central argument against positivism rests upon a distinction between legal rules and principles.¹¹ According to Dworkin, in hard cases courts use standards that function as principles rather than rules.¹² He cites the proposition that no one shall be permitted to take advantage of his own wrong as an example of a legal principle;¹³ the proposition that a will is invalid unless signed by three witnesses is an example of a legal rule.¹⁴

Rules are distinguishable from principles in two respects. The first distinction concerns the differing ways in which rules apply. Rules apply in an all-or-nothing fashion.¹⁵ If the facts that condition a rule exist, then either the rule applies, in which case the solution dictated by the rule must be accepted, or it does not, in which case the rule bears no relevance to the resolution of the case. A rule may have exceptions, but if it does, a full statement of the rule will list all of them.¹⁶

Principles operate differently. One can truthfully say that our legal system incorporates the principle that no one may profit from his or her own wrong without having to insist that the system never permits such profiting.¹⁷ Dworkin argues that we do not take an instance such as this as proving that principles are qualified by exceptions, but rather that we do not treat such counterinstances as constituting exceptions at all.¹⁸ The instances in

10. *See id.*

11. *See id.* at 22-28.

12. *See id.*

13. *Id.* at 23.

14. *Id.* at 24.

15. *Id.*

16. *Id.* at 24-25.

17. *Id.* at 25.

18. *See id.* at 25-26.

which the legal system refuses to apply any given legal principle are not subject to enumeration as exceptions to rules are. A principle does not purport to state conditions that make its application necessary; instead, it states a reason that argues in a certain direction.¹⁹ A principle is never conclusive by itself. In hard cases competing principles are always present.²⁰ One principle may prevail over a second in one case, but yield to it in another. All that is meant by the statement that a given principle is included within the legal system is that courts must at least take that principle into account, if it is relevant, as a reason for inclining in one direction or another.²¹

A second difference is that unlike rules, principles have weight.²² When two principles conflict, a court must resolve the conflict by measuring each rule's relative weight or importance.²³ The weight that a principle carries in a particular legal context is always significant,²⁴ but to ask the same question about rules does not make sense.²⁵ Rules do not have weight; if two rules conflict, one must be invalid. And the judicial decision as to which rule is valid must be reached on grounds transcending the rules themselves.²⁶

In the resolution of a hard case a court must necessarily rely upon principles rather than rules.²⁷ The resolution reached by the court in such a case will determine a rule for which the case can later be cited. But the rule will not preexist the case. The rule is fashioned by the judge on the basis of legal principles.²⁸

Dworkin contrasts two ways of understanding the role of principles. On one hand, they could be regarded as binding upon the courts in the same way as rules;²⁹ that is to say, the law contains certain principles that courts must at least consider in resolving hard cases. On the other hand, one might deny that principles are legally binding and maintain instead that in hard cases courts reach beyond standard legal principles.³⁰ Dworkin subscribes to

19. *Id.* at 26.

20. *See id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.* at 27.

25. *See id.*

26. *See id.*

27. *See id.* at 28.

28. *See id.*

29. *See id.* at 29.

30. *See id.*

the first notion. His basic argument is that one can describe courts as enforcing preexisting rights in hard cases only if the principles upon which courts rely in resolving hard cases are principles that the legal system compels them to consider.³¹

Courts do not have discretion in the positivists' sense. To say that someone has discretion with respect to the resolution of an issue is to say that he is not bound by standards imposed by the relevant authority.³² But courts never reach beyond standards imposed by the legal system. The principles relied upon by courts in the resolution of hard cases are themselves part of the law, and courts are legally obligated to take them into account.³³

It also follows that there can be no rule of recognition of the kind postulated by the positivists.³⁴ No master criterion exists for segregating all and only all of those rules of the social order that are "legal." It is the presence of principles in the legal system that makes the formulation of any such master rule impossible.³⁵ Legal principles do not arise from decisions of courts or enactments of legislatures. Instead, their origin lies in a "sense of appropriateness" that develops within the legal profession and the public over time.³⁶ Furthermore, one could never list all of the legal principles; they are literally countless.³⁷ Finally, even their identity is indeterminate and controversial;³⁸ it is inevitable that competent judges and lawyers will differ over whether any given proposition is a legal principle at all.

The positivist theory of legal obligation also must be rejected.³⁹ That theory holds that a legal duty exists if and only if an established rule of law imposes such a duty.⁴⁰ Hence, in a hard case no legal duty arises until the court creates a new rule and applies it to the parties in the suit *ex post facto*.⁴¹ Once one abandons the positivist doctrine of judicial discretion, one sees that legal duties are posited by constellations of principles as well as by established

31. *See id.* at 29-30.

32. *Id.* at 32.

33. *See id.* at 34-38.

34. *See id.* at 39-44.

35. *See id.* at 40.

36. *Id.*

37. *See id.* at 44.

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

rules.⁴² A legal obligation exists when the binding legal principles supporting such an obligation are weightier than the principles arguing against it.⁴³

Dworkin concedes that a consensus on how any particular hard case is to be resolved will rarely occur.⁴⁴ For one thing, room always exists for reasonable debate over the identify of the relevant principles.⁴⁵ Additionally, even if everyone agreed on a set of relevant principles in a particular case, there would never be agreement over the weights to be assigned each principle in that context.⁴⁶

If no master rule of recognition is present, logically no ultimate distinction can be drawn between legal principles and standards on the one hand, and moral and political principles and standards on the other.⁴⁷ This means that the principles and standards underlying any particular judge's resolution of a hard case will include moral standards.⁴⁸ But if this is so, how can Dworkin maintain that judges have no discretion? Is it not clear that allowing courts to appeal to moral and political principles is giving them discretion in the positivists' sense?

Dworkin's response relies upon the concept of institutional support. Only those principles and standards that have institutional support in the form of a "sense of appropriateness developed in the profession and the public over time" are eligible for use in the justification of judicial determination.⁴⁹ Presumably it is the presence of institutional support that prevents the adjudication of cases from degenerating into a decision based upon the individual moral discretion of particular judges.

To understand fully this concept of institutional support, one must consider the method of decisionmaking that Dworkin believes his theory to entail. He asks us to imagine each judge (and ultimately each lawyer participating in the legal order on behalf of clients) articulating a "theory of law" for resolving cases.⁵⁰ Such a theory would be constructed as follows: One would enumerate all

42. *See id.*

43. *See id.*

44. *See id.* at 126.

45. *See id.* at 44.

46. *See id.* at 40.

47. *See id.* at 46.

48. *See id.* at 68.

49. *Id.* at 40.

50. *See id.* at 66.

of the legal rules that are "plainly valid rules of law" in the relevant jurisdiction.⁵¹ One would then add to them all of the "explicit rules" about "institutional competence" used in selecting the first set of rules.⁵² One would then take those two sets of rules and look for the complex of principles necessary to justify them.⁵³ This search for a comprehensive justification ideally would result in a set of principles with weights assigned to each.⁵⁴

It must not be inferred from this that a theory of law could constitute a rule of recognition in the positivists' sense. For that to be the case a theory of law would have to constitute a "social rule," that is, a pattern of conduct shared by all informed participants in the legal order.⁵⁵ A social rule of recognition would consist of a set of practices, shared by all judges, determining the limits of the class of appropriate principles and standards.⁵⁶ No such social rule of recognition exists.⁵⁷ On the other hand, Dworkin does argue that a theory of law constitutes a "normative rule" of recognition.⁵⁸ A normative rule of recognition is a set of principles put forward as the morally acceptable standards for courts to use in resolving cases.⁵⁹ Any particular judge will have, at least implicitly, a normative rule of recognition in the form of a theory of law allegedly providing the most adequate moral justification for the body of explicit legal rules, but the theories will vary among themselves.⁶⁰

The concept of institutional support is tied to the distinction between "background rights" and "institutional rights." Background rights are moral rights as defined by some particular moral theory, which, in turn, are necessarily held by some particular individual. They are rights that provide justifications for "political decisions by society in the abstract."⁶¹ That is, they are rights on whose basis the legally enforceable rights of a society can be evaluated. On the other hand, institutional rights are rights "that pro-

51. *Id.*

52. *Id.* Such rules would presumably include constitutional and statutory rules concerning the jurisdiction of courts and legislatures.

53. *See id.*

54. *See id.*

55. *See id.* at 50-51.

56. *Id.* at 59-60.

57. *Id.* at 60.

58. *See id.* at 67.

59. *See id.* at 60.

60. *See id.* at 67.

61. *Id.* at 93.

vide a justification for a decision by some particular and specified political institution.”⁶² Associated with this distinction is a distinction between background and institutional morality. One may believe as part of one’s background morality that every person has a right to the property of another if the first has greater needs. And yet one may at the same time admit that there is no such legislative or judicial right, that is, that no such right is part of the relevant institutional morality.⁶³

Background rights and background morality are matters of what Dworkin calls “individual morality,” which is the set of personal moral beliefs and values held by an individual.⁶⁴ In contrast, institutional rights and morality arise from the “community morality,” which consists of the shared moral beliefs and values of an entire society.⁶⁵ Institutional rights are rights defined by the community’s institutional morality.⁶⁶

In hard cases courts must rely upon institutional rights and morality rather than background rights and morality.⁶⁷ It is this limitation that prevents adjudication from sliding into the subjectivity of personal moral discretion.

Dworkin illustrates this thesis by outlining a method for constitutional adjudication.⁶⁸ Imagine that a court must pass on the constitutionality of a statute providing for free busing to children in parochial schools. Suppose that the constitution includes a prohibition against the establishment of religion. Dworkin suggests that the court might begin by articulating a philosophical theory that explains why any constitution has power to create or destroy rights. Assuming the availability of such a comprehensive justification, the court must go on to seek the scheme of constitutional principles determined by the constitution. That is, the court must construct a “constitutional theory.” Such a theory will be a set of principles adequate to justify the constitution as a whole. The theory must “fit” the particular rules of the constitution; for example, the theory cannot include a “background right” to an established religion. But in general, more than one available theory will fit the clause prohibiting an establishment of religion. One such the-

62. *Id.*

63. *See id.*

64. *See id.* at 126.

65. *See id.*

66. *See id.*

67. *See id.* at 101.

68. *Id.* at 106-07.

ory might hold that government should not enact legislation likely to cause social tension, which presumably would be caused by an establishment of religion. Another theory might hold that all citizens have background rights to religious liberty, which presumably would be violated by an establishment of religion. The court will have to choose between such alternative theories. This choice will be made in part by looking to see which alternative coheres more closely with the entire constitutional scheme, that is, with the other constitutional rules and the "settled practices" under those rules. But even assuming that this test marks one of the alternative theories as superior, the theory chosen may not be sufficiently concrete to decide the particular issue before the court. Suppose, for example, that the court chooses the theory that relies upon the concept of religious liberty. Whether the statute before the court violates that liberty may still be an open question. To resolve this ambiguity, the court must explicate the concept of religious liberty itself. Assuming that the institutional morality that underlies the constitutional prohibition of an establishment of religion concerns the protection of religious liberty, the question may remain whether such liberty would be threatened by this statute. Resolution of this question would require the court to choose between alternative explications of the concept of religious liberty. The standard for making this choice would require the court to ascertain which explication best fits the total complex of constitutional rules and practices.

But again, checking for this kind of consistency between theory and institutional framework might not be sufficient. If it is not, the court must engage in political philosophy by deciding which alternative is a better explication of the concept of religious liberty. Even when the court is undertaking political philosophy, however, it is still trying to articulate the underlying moral framework of the institution rather than its own individual moral sense.⁶⁹

In response to the objection that this account portrays courts as relying upon their own moral convictions in resolving cases, Dworkin distinguishes two ways in which a judge might rely upon his own moral opinions. On the one hand, he might appeal to his own individual sense of rightness as ultimate arbiter.⁷⁰ On the other hand, he might appeal to his own moral convictions simply as a

69. *See id.* at 126.

70. *See id.* at 124.

means of ascertaining the nature of the institutional principles he is trying to explicate. He might proceed on the assumption that his own moral beliefs accurately mirror the moral beliefs of the community, and refer to the former as a matter of convenience. If one's own moral sense is a mirror image of society's moral sense, then all one need to determine the nature of the latter is to look within.⁷¹ Dworkin maintains that his theory does not allow a court to choose between its own moral convictions and those it takes to be the moral convictions of the "community at large."⁷² Rather, the theory requires a court to single out "a particular conception of community morality as decisive of legal issues."⁷³ The morality that provides the basis for a court's theory of law is the community morality "presupposed by the laws and institutions of the community."⁷⁴ Courts are compelled to rely upon their own sense of what the community morality is, but this kind of reliance is not the kind that would result in subjectivism or positivistic moral discretion.⁷⁵ Even when a court shares the values of the community morality, it relies upon its own moral sense as a guide or means of access to the essence of the institutional morality.⁷⁶ In such a case the "sharp distinction between background and institutional morality will fade, not because institutional morality is displaced by personal convictions, but because personal convictions have become the most reliable guide he has to institutional morality."⁷⁷

Again, Dworkin concedes that courts will often reach different conclusions as to the nature of the community morality.⁷⁸ But the debate triggered by judicial resolutions of hard cases is not a matter of individuals pitting their personal moral convictions against those of others,⁷⁹ such debate consists rather of individuals arguing over alternative explications of a socially shared concept or

71. *See id.* at 124-26.

72. *See id.* at 126.

73. *Id.*

74. *Id.* Notice that with the use of the word "presuppose" Dworkin apparently is committed to the proposition that when it comes to the relationship between moral principles and the laws of a particular community, there is only one possible set of moral principles that could be used to justify those laws. That is, Dworkin is committed to denying the possibility of there being more than one set of "community principles" that could provide justification for a particular set of institutions and laws.

75. *See id.*

76. *See id.* at 128.

77. *Id.*

78. *See id.*

79. *See id.*

principle.⁸⁰

Community morality does not consist of the sum of individual moralities held by the members of the community; it is a unitary phenomenon, a single complex of principles.⁸¹ The presence of conflicting claims about the nature of the principles does not commit one to denying the existence of a single focus for those claims, just as the presence of conflicting claims as to, say, the nature of a bright light shining in the night sky does not entail the conclusion that there is no single phenomenon to be described or explained.

In summary, Dworkin believes that even in a hard case for which no settled legal rule exists that disposes of the issue, one of the parties nevertheless has a preexisting right to win.⁸² Courts in hard cases are obligated to discover rights and duties; they are not entitled to create new rights retrospectively.⁸³ Any legal question has a single right answer.⁸⁴ But no mechanical decisionmaking procedure is available for determining the rights of parties in hard cases.⁸⁵ Reasonable lawyers and judges often will differ over legal rights.⁸⁶

How should one go about evaluating Dworkin's theory of adjudication? One point to be stressed is the theory's phenomenological depth. It is perhaps too easy for those engaged in jurisprudence to forget the lessons that should have been learned from Husserl.⁸⁷ An important preliminary to theorizing about the nature of the legal process is to pay close attention to the legal phenomena themselves. Only to the extent that one succeeds in seeing these phenomena is one in a position to theorize in a useful way. Dworkin's analysis of the adjudicative process sets new standards for this kind of descriptive effort. His careful analyses constitute an important class of the phenomena that any adequate theory must illuminate.⁸⁸

The book is equally significant for its theoretical comprehensiveness. It reminds us that phenomenological description, although

80. *See id.*

81. *See id.* at 128-29.

82. *Id.* at 81.

83. *See id.*

84. *Id.* at 279.

85. *See id.* at 81.

86. *Id.*

87. *See* E. HUSSERL, *IDEAS* (W. Gibson trans. 1931).

88. Considerations of space prevent me from incorporating his detailed analysis of common-law adjudication. For a discussion on this topic, see R. DWORKIN, *supra* note 5, at 110-23.

important, is not of much use if pursued for its own sake. Dworkin proposes his theory as a major alternative to the positivistic and realistic theories that have prevailed in Anglo-American jurisprudence in recent times; as such, it deserves careful attention.

Perhaps the central question is whether Dworkin's effort succeeds in avoiding attributing to courts discretion in the positivistic sense. According to Dworkin, to attribute discretion to a judge in the positivists' sense is to say that the judge is not bound by standards imposed by the relevant authority,⁸⁹ presumably the body of law of the relevant jurisdiction.⁹⁰ Does a Dworkinian judge have discretion in this sense?

Here the analysis becomes obscure. Dworkin's basic argument is that judges have no discretion because they are bound by principles of community and institutional morality that are themselves part of the law. But this would be unlikely to persuade a positivist. A positivist presumably would be unwilling to regard such principles as part of the law in his sense of "law." If Dworkin is right about the definition of positivism, then a positivist is committed to belief in a master rule of recognition formulable as a social rule. Dworkin denies the existence of such a social rule and concedes that principles in his sense cannot be selected by any such criterion. But it must follow that a positivist would not deem anything to be part of the law that is not determinable by such a criterion. Hence, the positivist would be unwilling to concede that Dworkinian judges lack discretion in hard cases because they are not bound by rules or principles ascertainable by a social rule of recognition, which therefore are not rules or principles of law at all.

The objection might be raised that this shows only that the ultimate dispute between Dworkin and the positivist is over the existence of a social rule of recognition. In a sense, this is correct; however, the point is that even if the positivist were persuaded to reject the possibility of a rule of recognition, he would presumably still be unwilling to accept Dworkin's claim that courts lack discretion. The positivist might simply say: "I was mistaken about the rule of recognition. There is none. But that proves even more clearly that judges do have discretion. If they are not bound by a social rule of recognition upon which all informed participants can agree, then they are bound by nothing except their own personal

89. *See id.* at 32.

90. *See id.* at 34.

moral and political beliefs, and if that is not discretion, nothing is.”

Thus, one of the deepest differences between Dworkin and the positivist appears to be the distinction between truth and verifiability. Dworkin rejects what he takes to be the positivist tendency to identify truth with public verifiability.⁹¹ But even if the positivist were to agree that in some ultimate sense truth and verifiability are distinct, I believe he would still maintain that if courts in hard cases are not bound by publicly shared, intersubjectively applicable methods of the kind provided by a social rule of recognition, then they do have discretion in an important sense.

The positivist might understandably believe that the sense in which courts are bound by law in Dworkin's theory is a very weak one. Apparently, principles bind courts only in the sense that courts, in resolving hard cases, are obligated at least to consider the possible relevancy of the principles. There is no predetermined set of principles and no consensus as to the weights to be assigned them in any particular legal context.

This reluctance to be impressed by Dworkin's concept of being bound by law is one likely shared by those on the opposite end of the jurisprudential spectrum—those attracted by some version of the Noble Dream. I suspect that one who is disturbed by the thought that judges have discretion in the positivistic sense is not likely to feel much better at the prospect of judges being bound by the law in Dworkin's sense. One concerned about the threat of indeterminacy of adjudicative result is not likely to be calmed by an appeal to principles that are moral and political in nature, whose identity is controversial, and that carry a dimension of weight that varies from context to context and from person to person.

This leads to Dworkin's claim that preexisting legal rights exist and that legal issues have uniquely correct solutions. Because he rejects the possibility of a social rule of recognition, he cannot maintain that rights and obligations flow from the law as defined by positivism. In fact, as we have seen, he argues that no ultimate distinction at all can be drawn between legal and moral principles. The key lies in his concept of an institutional morality. The body of principles by which judges are bound is embedded within the community morality. The preexisting rights that courts discover

91. *See id.* at 279-90.

are institutional rights defined by the institutional morality of the social order in which the courts participate. The uniquely correct solution to a legal question is unique not because it follows from objectively true moral principles, but because it follows from the relevant institutional morality. Thus, it appears that Dworkin is ultimately a conventionalist with respect to moral truth, at least insofar as moral truth is brought to bear upon the adjudicative process.⁹² Legal reasoning is a mode of moral reasoning, but moral reasoning, as applied in the adjudicative context, is a matter of inferring conclusions from the community's shared morality.

One of the questions that should be asked is whether a community morality exists in the sense required by this theory. Here one must appeal to one's phenomenological sense of things. In some sense, participants in a social order seem to share moral norms and practices. The question, however, is whether the kind of pattern sharing that exists in a complex society is sufficiently monolithic or determinate to accomplish the epistemological task Dworkin has set out to complete. I think that this is doubtful. The better account would appear to be one that understands moralities as primarily individual, rather than social, phenomena, and that the sense in which socially shared moralities exist is different from, and far weaker than, the sense in which moral orientations are expressed by the actions and practices of individuals. As I shall try to explain more fully later, a socially shared norm or practice is necessarily less than fully concrete, and hence is necessarily indeterminate. A socially shared practice or pattern can be made concrete in the world only through instantiation by specific acts of persons. Each such act presupposes a specific interpretation of the abstract pattern. These specific interpretations inevitably tend to differ among themselves. Hence, the instantiation by individuals of socially shared patterns makes impossible any monolithic or unitary community morality. There is unity, if at all, only on the abstract level of the patterns as such. When the patterns are applied in history through concrete acts of interpretation, there is disunity and variation.

I suggest that Dworkin's underlying picture of the moral reasoning done by courts tends to mislead. That picture consists of a unitary, monolithic structure at which individual judges look from

92. Strictly speaking, perhaps the most that can be legitimately inferred from Dworkin's text is that moral conventionalism is the proper pose for judges acting in their official capacities as judges, not that individual morality is ultimately a matter of convention.

their varying perspectives. On one hand, we have a single unitary phenomenon, the community morality. On the other hand, we have the individual perspectives that, although likely to vary among themselves, are nevertheless focused upon the same thing, the common institutional morality. The implicit appeal is to the kind of relationship existing between a physical object (*e.g.*, the moon), and the different physical perspectives of individuals looking at the object in an effort to ascertain its nature (*e.g.*, individual astronomers peering at the moon through their individual telescopes). This picture is misleading in that if there is no such unitary phenomenon, reliance upon the metaphor can only distort thinking about the nature of adjudication.

If this criticism is valid and if judges use moral reasoning in hard cases, as Dworkin convinces me that they do, then the challenge is to articulate an account of legal reasoning that does justice to the fact that courts do use moral reasoning but that does not appeal to a mythical notion of institutional morality.

In addition, Dworkin's assumption of the significance of ranking judicial decisions according to their degree of rationality and moral justifiability seems to mirror an intuition shared by many lawyers. We seem to sense that legal reasoning, at least ideally, is objective and rational and that it in some way makes sense to discuss legal rights in terms of objective truth and validity. But if Dworkin's notion of a community morality is a myth, then the task is one of articulating a different basis for this intuition.

An adequate account should also incorporate, and account for, Dworkin's thesis that a socially shared practice is essentially indeterminate in application, that is, that the application of such a pattern in particular instances is generally a matter of controversy. Even if Dworkin's belief in a single community morality is misguided, his intuition of the unavoidable presence of indeterminacy in the application of socially shared norms is one that should not be ignored.

Finally, Dworkin's account of the role of principles in legal reasoning should be incorporated in any adequate jurisprudence. His insight is that principles function as reasons that influence a court in deciding one way or another, rather than as rules applicable in an all-or-nothing fashion. The difficulty with his account, however, is that his concept of weight does not shed much light on the ways in which such reasons are used in legal justification. An adequate account of legal reasoning would explain the role of reasons

in a way that would not appeal to the metaphor of balancing weights. This image is ineffective, both because it suggests the availability of a decision method that we really do not have, the method of "weighing" the reasons, and because it does not instruct us how courts do or should use reasons in reaching conclusions.

In summary, an adequate theory of adjudication should incorporate at least the following features. It should allow for, and explain, our intuition that in some sense legal reasoning is potentially objective and rational, and that one can distinguish between degrees of validity and justifiability of legal conclusions. At the same time, the account should incorporate the positivists' insight that adjudication is inherently morally creative and that in an important way judges do have discretion. It should account for the role of moral reasoning in adjudication, but in a way that does not posit a unitary institutional morality or a moral conventionalism. It should explain the way in which adjudication does apply socially shared norms and practices, but in a way that allows for the essential indeterminacy of those patterns. Finally, the account should explain the role of reasons in adjudication in a way that discloses the manner in which they actually work and that suggests methods for improving that working.

III. A NATURAL LAW THEORY OF ADJUDICATION

I suggest that all of these features can be provided by a natural law theory of adjudication. Such an analysis, based upon concepts formulated by Plato, Aristotle, Aquinas, and Heidegger,⁹³ portrays a legal system as a teleological structure whose primary function is the serving of human purposes. Legal reasoning is understood as a mode of reflective thinking concerned with teleological arguments, which are those arguments that assess the adequacy of means to produce ends and the desirability of the ends.

Adjudication is a form of practical reasoning in which the adjudicator chooses between alternative solutions of a case on the basis of teleological considerations pertaining to moral objectives that are in some sense shared. A judicial decision is an act, and, like

93. I do not claim that the details of the following analysis can be found in the works of Plato, Aristotle, or Aquinas, but I do think that their work readily suggests that kind of approach. Furthermore, although Heidegger did not consider himself a natural law philosopher, I believe that many of his insights can be accommodated easily within a natural law framework. See M. HEIDEGGER, *BEING AND TIME* (J. Macquarrie & E. Robinson trans. 1962).

any act, can be teleologically evaluated in terms of moral purposes. Thus, legal reasoning is a form of moral reasoning and the latter is itself a form of teleological reasoning. Hence, to the extent that teleological reasoning is objective, or capable of being so, legal reasoning is objective as well. And because the natural law theorist thinks that moral reasoning is objective, he is committed to attributing a similar type of objectivity to legal reasoning.⁹⁴

Reasoning is a mode of reflection in which conclusions are drawn on the basis of other beliefs relied upon as premises; it is the process of drawing inferences. The product of reasoning is the argument, a set of propositions consisting of premises, conclusion, and inference steps. Arguments can be classified as either deductive or inductive. A deductive argument is one whose user purports to establish a logically necessary connection between premises and conclusion; that is, a deductive argument purports to show that it would be logically inconsistent to accept the premises while denying the conclusion. On the other hand, an inductive argument purports only to establish a greater or lesser degree of probability connecting premises and conclusion; the most one can conclude from a successful inductive argument is that if the premises are true, then the conclusion is probably true as well.⁹⁵ I shall argue that, when fully analyzed, legal arguments are inductive.

By an "objective" mode of reasoning, I mean a mode of inference in which the standards for evaluating arguments cast in that mode are sufficiently shared and understood by participants to allow for the possibility of informed consensus as to the validity of particular arguments. I believe that legal reasoning is capable of objectivity in this sense. I do not mean to suggest that legal reasoning is capable of a degree of objectivity that would exclude the possibility of good-faith dispute. And I certainly do not mean to suggest that legal reasoning is reducible to a finitary decision procedure. But the unavoidability of strict mathematical objectivity does not mean that legal argument must be consigned to the realm of the irrational. If moral reasoning does not carry the potentiality for mathematical objectivity, one should not despair of its rationality but should rather try to understand the kind of rationality that it does have.

94. For an illuminating, general account of the natural law framework, see McNery, *The Principles of Natural Law*, 25 AM. J. JURIS. 1 (1980).

95. For an account of these elementary concepts, see S. BARKER, *THE ELEMENTS OF LOGIC* 1-12 (3d ed. 1980).

Both the possibility and necessity of moral reasoning follow from the fact that we are temporal beings with a measure of freedom concerning the uses to which our time is put. That is, a person is a mode of time with some capacity to shape and direct the uses of that time. I shall refer to this mode of time as "personal time."

Given the concept of personal time, one can explicate the concept of a human action. To act is to use personal time in one way rather than other ways. It follows from this usage that a person acts in every conscious moment, since there is always some answer to the question "What am I doing now, as opposed to all the other things which I could be, but am not, doing?" This is not to deny the role of necessity; factors are inherent in every concrete set of circumstances beyond the control of the individual. Nevertheless, as the Stoics argued,⁹⁶ room always exists for alternative attitudes to those factors in one's experience that cannot be altered.

Human action is teleological, that is, it is goal-directed. It is a matter of using personal time in an intentional way, a matter of acting to achieve objectives. To act is to act with an intention. This is not to discount the existence of unconscious purposes. Unconscious intentions guide conduct just as efficiently as their conscious counterparts. The point is that such purposes, although unconscious, are nevertheless intentions. Purposive conduct may be conscious or unconscious, in varying degrees. But it is always teleological.

Purposes arise from needs and desires. One acts to achieve purposes and one has purposes only because one has needs and desires. This is not to suggest that purposes constitute one class of psychological phenomena and needs another. In a trivial sense one desires whatever one pursues as an objective. The distinction instead relates to two different dimensions of intentional conduct: the objective state of affairs one seeks to bring about, on the one hand, and the felt want or desire, on the other.

The concepts of desire and action lead to the concept of emotion or state of awareness, or state of mind in Heidegger's sense.⁹⁷ A state of awareness is one's experience of oneself in response to the relationship between the world as experienced and one's desires. Within the general category of states of awareness one can distin-

96. See Epictetus, *Discourses*, in *THE STOIC AND EPICUREAN PHILOSOPHERS* 275-80 (W. Oates ed. 1940).

97. See M. HEIDEGGER, *supra* note 93, § 29.

guish states of well-being from states of suffering. One suffers to the extent that a desire is unfulfilled; one experiences well-being to the extent that a desire is fulfilled.

The natural law tradition posits the existence of a human essence—a deep set of needs and desires, common to all persons, whose fulfillment tends to bring about whatever measure of well-being is attainable in the human condition. Frustration of that essence causes suffering. These essential desires strive to realize themselves in modes of activity. To the extent that one acts in ways tending to fulfill the essential desires one has well-being. To the extent one fails in this effort one suffers. Action directed to the fulfillment of the essential needs constitutes the meaning of human existence.

The human good is definable as the integrated fulfillment of the essential needs and desires.⁹⁸ This is an intrinsic good in the sense that its pursuit requires no justification in terms of serving as a means toward the achievement of any other ends. Instrumental goods are those that serve as conditions either necessary or useful for the attainment of intrinsic good.

A natural law theory of the right is a teleological, as opposed to deontological, theory,⁹⁹ that is, the concept of the right is definable in terms of the good. Actions are *prima facie* right or morally justifiable insofar as they tend to promote intrinsic good. This criterion of the right applies not only to discrete actions but to norms and practices as well. Thus, the standard for the moral justifiability of social patterns, including legal norms, looks to the degree to which those patterns tend to promote, or frustrate, the achievement of intrinsic good.

The natural law theory of intrinsic good does not deny the existence of conflicting desires. It is commonplace that the complex of desires within any individual is such that fulfillment of some causes frustration of others. It follows that even a life in which the essential desires are fulfilled, to the extent possible in the human condition, inevitably includes a measure of suffering resulting from frustration of desires that conflict with the essential needs. How-

98. For an interesting recent formulation of a natural law theory of intrinsic good, see D. WALHOUT, *THE GOOD AND THE REALM OF VALUES* (1978).

99. A deontological theory, in the standard usage, is one that denies that the right is wholly a function of the good. That is, it maintains that there are other considerations that make an action right besides the good results brought about by the act. For general discussion, see W. FRANKENA, *ETHICS* 14-17 (2d ed. 1973); J. RAWLS, *A THEORY OF JUSTICE* 30 (1971).

ever, the tradition also insists that the kind of suffering brought about in this way is not as deep as that caused by frustration of the essential needs. One whose essential needs are fulfilled is integrated in a sense in which one whose essential needs are unmet cannot be; integration is a state in which the kind of frustration that results from conflict of basic desires is minimized.¹⁰⁰

The concepts of a moral question and moral reflection can now be explicated. A moral question arises for any given use of personal time, that is, for any human action or pattern of conduct. This is so because given any particular way of using human time there are always alternative uses of time that have been excluded by the former use. Hence, the paradigmatic question of morality, "Why do this rather than that?" can be asked with respect to every use of human time. And this question, in turn, calls for a moral justification of the action chosen. Moral reflection is reflection about the potential uses of one's time and the available justifications for those alternative uses. More particularly, it is reflection about the nature of intrinsic human good and about the conditions necessary or useful for the attainment of intrinsic good. To determine the sense, if any, in which moral reflection is potentially rational one must examine the process of moral reflection more closely.

It is useful to begin with an analysis of the process of reflecting upon the motivations leading an individual to take a particular course of action. This process can be understood as issuing in a form of practical argument in the Aristotelian sense. Imagine, first, trying to account for an action of one's own. One might begin with stating one's immediate objective. Having tentatively ascertained this, one might go on to ask whether pursuit of that objective in turn was taken as a means toward achieving some further end. In this manner one eventually will specify a series of objectives or ends, each of which was pursued as a means toward the ends specified later in the sequence. (One possible schematic form of such an analysis is the following: in doing X my immediate objective was Y. I sought Y as a means to Z. I sought Z as a means to Z₁, and the latter as a means to Z₂, etc.). I shall refer to the result of such an analysis as an "explanatory practical argu-

100. For helpful discussions of this sense of integration, see F. BRADLEY, *Why Should I Be Moral?*, in *ETHICAL STUDIES* 58-82 (2d ed. 1927); A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* ch. 10 (2d ed. 1968); R. MAY, *MAN'S SEARCH FOR HIMSELF* (1953).

ment,"¹⁰¹ which means a teleological form of reasoning about means and ends with respect to use of personal time, purporting to account for the action taken by reference to the underlying motivations and intentions.¹⁰²

Such an argument can be schematized in a more formal manner:

- 1) I desire A for itself and not as a means to anything else.
 - 2) I believe that doing B is either a necessary or useful means of achieving A.
 -
 - n) I believe that doing N is either a necessary or useful means of attaining N-1.
- Therefore: I choose to do N.

This concept of an explanatory practical argument can be related to the concept of a reason for acting. The entire teleological structure of an action articulated by the appropriate practical argument constitutes one's reason for making that choice. That is, one's reason for making a particular choice consists of the total means-end sequence that one was pursuing at the moment of the act.

Without completing a teleological analysis one does not fully understand one's action at all and hence would be unable even to characterize it adequately. One has not fully characterized an action or pattern of conduct until one has described the ultimate purpose or project constituting the final term in the sequence of ends. Some qualifications should be made, however. First, I do not mean to imply that the process of explaining one's conduct in teleological terms is easy. On the contrary, the process is often difficult, sometimes requiring the assistance of experts' therapeutic guidance. Second, ends brought forth in such analyses are often

101. The term "explanatory practical argument" may seem self-contradictory since explanations are commonly distinguished from justifications. I use this phrase to convey the idea that the teleological structure of a human action constitutes both an explanation of the conduct and the chain of reasoning that, in fact, persuaded the agent to act in that manner.

102. Of course, this schematic form is a drastic oversimplification of the motivational structure of the typical act. For one thing, the form misleadingly suggests that the sequence of objectives is always linear. In fact, in most cases there will be branchings of means and ends. That is, many of the specific objectives in such an explanatory analysis will in turn be chosen as tending to promote more than one further end. But at the same time, if the natural law tradition is correct in believing that all human action is ultimately explicable as aiming at a single overarching end, the branchings of any teleological analysis will eventually close at the top. See T. AQUINAS, *Summa Contra Gentiles*, in INTRODUCTION TO ST. THOMAS AQUINAS 435-37 (A. Pegis ed. 1948).

therefore unconscious. Third, such explanatory analyses are generally subject to reasonable debate. Sometimes one cannot achieve complete certainty even with respect to one's own motivations. This does not mean that no correct teleological analysis of such an action exists, but it does mean that the correct analysis is sometimes shrouded in ambiguity. Finally, at some point in the teleological sequence of means and ends one will invariably find oneself characterizing objectives in terms of desires.

This last point may be explained by an analysis of the motivational structure of a lawyer's act of driving to his or her law firm on a particular morning at 6:30: "My immediate objective is to arrive at the firm by 7:00. My objective in arriving at the firm by 7:00 is to accomplish a great deal of work. My objective in accomplishing all this work today is that I have additional work for tomorrow that cannot be done until I get today's work out of the way. My objective in doing a great deal of work tomorrow is to maintain a very high level of productivity in my work at the firm. My objective in maintaining a high level of productivity is to impress the partners who will eventually be passing on the question of my being made a partner. The reason I want to impress the partners is that I want to be a partner. The reason I want to be made a partner is that I want to be successful in a way that those I respect count as successful. The reason I want to achieve status in the eyes of those I respect is that I want to have a sense of meaning in life and I feel that without such approval I will not find a sense of meaning. Etc., etc." Notice how the seemingly impersonal language of objectives and intentions quickly merges into language of want and desire. This is what one would expect given the fact that objectives and intentions are always grounded in subjective needs and desires.

Consider the ways in which one might critically evaluate the motivational structure of an action. One way is to evaluate the alleged means-ends relationships. If in the teleological structure of the action X was chosen as a means to Y, one might challenge the justifiability of that belief. That is, one might attempt to determine whether X is a reasonable means of attaining Y. This kind of evaluation requires one to think about the nature of the world and, in particular, about causal relationships.

Second, one can critically evaluate the desirability of the ends by attempting to determine whether seeking those ends is consistent with the ideal of a truly fulfilled human life. Here the question is whether seeking a particular end would tend to promote, or

be an integral part of, intrinsic human good, where intrinsic human good is defined as the harmonious fulfillment of one's essential capacities and powers.¹⁰³

How might one respond to a challenge of the desirability of one of these ends? One would try to justify one's pursuit of the end by arguing that it is a constituent of at least one's own intrinsic good. That is, one would claim that pursuing a particular end is an integral part of seeking the truly good existence for oneself; it is an end that arises from one's own specific essence. If this is correct then the overall schematic structure of such a justificatory argument would look something like this: "I did X to achieve Y which I sought to achieve Z which, . . . , to achieve Z_n, which I believe is intrinsically desirable in that it is an integral part of the intrinsically good human existence as definable for my own case."

It follows that the attempt to justify morally one's own action requires one to make assertions at least about one's own essence, *i.e.*, about the nature of the intrinsic good as definable for one's own case. The question is whether one can stop with this. Is one compelled to generalize from one's own case to assertions about the nature of the human essence as such? I think that one is so compelled. In claiming that an end is part of one's own intrinsic good, one is at the very least claiming that one's pursuit of it is itself part of the intrinsic good, that one's fulfillment in this particular respect is an intrinsic good in itself even from the standpoint of the world as a whole. That is, the claim must be that somehow the world as such increases in value by the fact that one derives fulfillment in this particular respect. In addition, suppose someone claims that fulfillment of a particular desire is part of his own intrinsic good but of no one else's, presumably because the desire is unique to his own case. But then he must at least be asserting that it is part of the general human essence to have the freedom to pursue whatever happens to be one's own unique desires.

Finally, an even stronger claim can be made. If one discovers within oneself a desire that superficially appears unique to one's own psyche, I think the inevitable tendency is to believe either that similar desires are buried below the level of consciousness in others or else that one has been given a greater share of the human essence than others, that is, of the common capacities, powers, and desires that define the human condition.

103. For an analysis of this concept of intrinsic good, see H. VEATCH, *RATIONAL MAN* 47-78 (1962).

What is the structure of an explanatory practical argument after completion of an effort to morally justify choice? The argument can be cast in the following schematic form:

- 1) Fulfillment of desire A is part of the human essence; i.e., fulfilling X is an intrinsically desirable activity.
- 2) Doing B is either a necessary or useful means to the fulfillment of A.
- ...
- n) Doing N is either a necessary or useful means to the attainment of N-1.

Therefore: my doing N is morally justifiable.

I shall refer to an argument of this form as an evaluative or justificatory practical argument.

There is no obvious deductive relationship between the premises and the conclusion of such an argument. It does not seem that affirming the premises while denying the conclusion results in a logical contradiction. But this does not mean that such inferences are irrational or groundless. They are no more groundless than an inference such as concluding there exists a red ball on the front lawn from the belief-premise that there now appears to be a red ball on the front lawn. The realm of justifiable belief is not limited to the realm of deductive inference.

In addition, this analysis of the concept of an evaluative practical argument illustrates the sense in which conclusions about moral obligations and values must be grounded in metaphysical assertions about the nature of reality. The ultimate premise of such an argument is a claim about the nature of the human essence, and whatever else such a claim comes to, it is at least a metaphysical claim. On the other hand, the conclusion of such an argument is a statement about moral justifiability or obligation. Thus, the schematic form exhibits the inevitable transition from metaphysical to moral assertion. Hence, the inference from fact to value that Hume¹⁰⁴ and his descendants have decried is a necessary element of moral reasoning. The lack of deductive connections between such metaphysical premises and moral conclusions ought not concern us. Again, to the extent one accepts the inevita-

104. According to Hume, the essential error involved in attempting to ground value judgments upon judgments of fact lies in attempting to infer conclusions containing terms of moral evaluation, such as "ought," from premises that do not contain such terms. *See* D. HUME, *A TREATISE OF HUMAN NATURE* 455-76 (L. Selby-Bigge ed. 1888). For a standard presentation of the alleged fallacy, see J. HOSPERS, *HUMAN CONDUCT* 532-38 (1961).

bility of practical reasoning one commits oneself to the proposition that many of one's most important beliefs do not rest solely upon deductive inferences.

It is instructive to note the differences between explanatory and evaluative practical arguments. First, the form of conclusion differs. The conclusion of an explanatory practical argument is a decision, while that of an evaluative practical argument is a claim that a particular decision is morally justifiable. Second, the form of the intermediate means-end premises differs. The intermediate premises of an explanatory practical argument have the form of subjective belief-statements; those of an evaluative practical argument are claims about the nature of reality. Finally, the ultimate premises vary. The first premise of an explanatory practical argument is a statement of subjective desire; that of an evaluative practical argument is an assertion about the objective nature of the intrinsic human good.

The concept of a justificatory practical argument has far greater application than evaluation of decisions already made. It applies as well to the evaluation of decisions that could have been, but were not, made. Once one turns from the task of articulating the teleological structure of action to that of justifying past action with evaluative practical argument, one is necessarily drawn into the consideration of alternative actions that might have been, but were not, chosen. And each such alternative in turns calls implicitly for evaluative practical arguments that might be marshalled in support. Thus, once one asks the question, "Was that action justifiable?" one cannot avoid asking the further question, "What were the available alternatives, and were any of them more justifiable than the one I chose?"

Similarly, contemplation of choices yet to be made calls forth justificatory practical argumentation. Ideally, one begins considered reflection about a choice to be made in the future by sorting out the major alternative choices. For each alternative, in turn, one looks for appropriate evaluative practical arguments in support of that choice. It is on the basis of a comparison of such alternative justifications that one makes a morally considered judgment. The problem becomes one of evaluating the justificatory practical arguments that can be proposed in support of each alternative and choosing the alternative with the strongest support.

Is the activity of moral reflection, as explicated here, potentially

rational? In what sense, if any, can one legitimately characterize justificatory practical arguments as valid or invalid?

Consider the first-person case in which one evaluates the moral justifiability of one's own act. Surely the appeal to the intermediate means-ends steps raise objectively resolvable questions. Such claims make causal assertions about the world and are confirmable or disconfirmable by reference to the objective causal order. This is not to say that resolution of such premises is always, or even usually, easy or noncontroversial. But to deny the possibility of arriving at an objective conclusion about the relationship between one's ends and alternative means would be to commit oneself to understanding human existence as a hopeless game in which one is arbitrarily saddled with desires but given no methods for determining ways in which any of them might be satisfied. We do not perceive our condition in this way. Does anyone doubt that, given a desire for food, one can objectively determine that eating a sandwich is an appropriate means of satisfying that desire?

What about the assertions of intrinsic desirability, the claims purporting to characterize the human essence as such? The question to ask oneself here is: What would it be like to deny the possibility of finding the truth about such claims? Presumably it would be to deny the possibility of an integrated life of well-being. It is one thing to deny that one has an integrated life; it is another to deny the very possibility of knowing what such well-being might be. Try to imagine convincing oneself that although one finds oneself with a complex of needs and desires there is no possible way of discovering which of those desires, if fulfilled, would lead to a deeper level of well-being than others. The very act of continuing to exert oneself in action contradicts any such attempt. It is a necessity of thought that one can, through effort, discover those desires within oneself that comprise one's own essence, *i.e.*, those desires that yield ends which, in turn, constitute the intrinsically desirable for one's own case. But this is to say that in some sense one seeks the ultimate good in everything one does and cannot help believing that such a good exists, even if one is in doubt as to its nature or as to the practical feasibility of achieving it in one's concrete situation.

This argument can be formulated alternatively as follows: In the very process of living, one necessarily becomes aware of the difference between well-being and its absence; one learns to distinguish states of awareness that tend toward integration from those that do not. This is part of what it means to be a being with emo-

tional states. In this process of learning to distinguish well-being from its opposite, one learns at the same time that certain modes of activity tend to yield well-being while others tend to yield the opposite. What could account for this? The only plausible explanation is that one possesses a deep essence constituted by a complex of needs and desires, the fulfillment of which tends to lead to well-being and integration. Hence, one is driven to postulate the existence of such an essence within oneself and to recognize that the ultimate objective in all of one's activities is to realize that essence. But if this is the case, propositions about the nature of that essence are capable, in principle, of confirmation or disconfirmation.

With this, one comes close to the core of the natural law conception that was one of Plato's central concerns.¹⁰⁵ In all of one's actions one seeks the ultimate good. One might not know in any great detail what this ultimate good is; sometimes one has very little idea whatsoever. But it is part of our deepest conviction about our metaphysical situation that an ultimate good does exist and that to the extent one discovers its nature and realizes it through patterns of action, one will achieve integration and well-being. Thus, not only is it the case that all human action is intrinsically teleological in the sense that in all action one seeks to achieve purposes, but our central concern in pursuing objectives is to realize ultimate good. And ultimate good, in turn, is believed to be a mode of human activity which, if achieved, would fulfill those needs and desires that define the human essence.

If the process of moral reflection is rational, the question arises as to the appropriate methods for engaging in such activity. How should one go about ascertaining the truth about the nature of intrinsic human good and the conditions necessary or useful for its attainment? Of course, there is no short answer to this question. Certainly part of any adequate method involves experimentation and introspection. As one lives, one finds oneself pursuing a variety of desires and felt needs, and in so doing, one has an opportunity to examine one's own states of awareness and the consequences of pursuing certain ends in certain ways. This process of self-education, if undertaken consistently and in a disciplined manner, will shed light on the nature both of one's human essence and the conditions useful or necessary for fulfilling that essence.

Another element of any adequate method is observation of the

105. See PLATO, *GORGIAS* (W. Hamilton trans. 1960).

experiences of others, both in the present and in history. One does not need literally to experiment with all possible modes of existence to learn that at least some can be ruled out either as not aiming at intrinsic needs or as not constituting necessary or useful means to the attainment of essential needs.

An important qualification should be made at this point. I have been arguing for the possibility of objective moral knowledge. But I also want to concede the difficulty and obscurity inherent in the task of acquiring such knowledge. It is common for one to be mistaken about the intrinsic human good. It is possible to spend a lifetime pursuing ends that prove to be outside the class of essential human needs. In addition, it is possible to seek intrinsic good by unreasonable means for achieving such good. Thus, even if one understands to some extent the nature of ultimate good, one can easily be mistaken about the appropriate means of realizing that good. The process of moral reflection in one sense is a task that cannot be completed. Progress in moral knowledge is attainable but final clarity and certainty is not. Hence, a measure of skepticism about the possibility of final moral certainty is part of a mature moral awareness.

What about the objectivity of moral reflection about the actions of others? Here the problem is one of evaluating the intermediate means-end premises and the premises of ultimate desirability in someone else's justificatory practical argument. The presupposition of the very effort to evaluate critically another's claim to be pursuing an intrinsically desirable end is that both parties share the same fundamental essence. That is, one assumes that those ends that one has discovered to be intrinsically desirable in one's own case are as ultimately desirable for others. This assumption is not only shared by everyone; it is a rational assumption. For, given one's recognition of another's humanity, it is surely plausible to generalize from one's own self-knowledge to conclusions about the other's intrinsic good. What could sharing the attribute of humanity be except sharing the same essence, the same fundamental complex of needs and desires the fulfillment of which constitutes intrinsic human good?¹⁰⁶

In one sense, moral reflection in a social context is more difficult due to the difficulties of understanding the language and experi-

106. Of course, it must be remembered that this point concerns intrinsically desirable ends, not ends that serve other ends. Thus, facts such as X liking ice cream and Y disliking ice cream do not constitute counterexamples.

ence of others. But that one nevertheless lives with a belief in the possibility of objective moral knowledge sharable by persons seems a necessity of thought. If one believes that one can, with effort, acquire moral knowledge about one's own intrinsic good, one naturally and justifiably finds oneself believing that knowledge acquired in this way is applicable to the lives of others and is, in principle, capable of being communicated to them.

And of course this is not a one-way affair. Not only does one assume that moral knowledge one discovers for oneself is communicable and applicable to others, one also finds that moral knowledge acquired by others can be usefully communicated to oneself. Thus, the process of moral self-education is a communal process.

If the foregoing is correct, one can understand the sense in which moral reasoning is objective but incapable of absolute certainty. It is objective in the sense that an objective human essence exists that is composed of a complex of deep needs and desires, the fulfillment of which by certain patterns of activity yields integrated well-being. It is incapable of mathematical certainty both because one can never be sure of the total configuration of the human essence (*i.e.*, of intrinsic good) and also because one is often uncertain about the causal relationship between means and ends.

To apply this analysis to legal reasoning one must consider the concept of a pattern of action. One engages in a pattern of action to the extent to which one repeatedly acts in the same, or similar, way in response to a given type of situation. One who invariably shakes hands when introduced engages in a pattern of action; the same holds for one who cannot look at a tree without meditating. Like discrete acts, patterns of action are teleological; that is, they are explicable by reference to underlying purposes toward which they are directed. And as with discrete acts, they cannot be fully understood without reference to those underlying purposes.

Consider a pattern not generally shared by a community of persons, that is, a pattern uniquely characteristic of a particular individual. Here the process of explicating the teleological structure is the same as for the case of a discrete action. The underlying purposes may be, and often are, unconscious, but can in principle be brought to the surface. These underlying purposes, in turn, are directed toward the fulfillment of underlying needs and desires. Once the teleological structure of the pattern is uncovered, it can be critically evaluated. If defended, the explanatory practical argument will be converted into an evaluative practical argument.

And this evaluative practical argument, in turn, is subject to critical evaluation both with respect to the intermediate means-end steps and the ultimate premise. As is the case with discrete acts, the critical evaluation of an existing pattern of action tends to lead to consideration of alternative patterns that might be morally superior. One naturally is led to consider possible ways of modifying one's patterns of conduct in the effort to more fully realize intrinsic good.

A difference between unconscious and conscious purposes exists with respect to guidance of conduct with a pattern. Conduct is guided in either case but the nature of the guidance differs. An unconscious purpose guides conduct below the level of conscious awareness. There is no possibility for reflective consideration about the different ways in which the pattern might be expressed in a given situation, or about the pattern's appropriateness in another. When a pattern is conscious, the individual deliberately guides himself by a normative standard of conduct that he is able to hold before his consciousness when he chooses whether, and in what manner, to engage in the pattern on a given occasion. When the guidance provided by a pattern becomes conscious, we find ourselves talking about a normative rule of action. Here we seem to be referring to a directive formulable in words by the person whose conduct is guided by the rule.

A pattern that has become conscious may be action-guiding in two contrasting ways. On the one hand, the pattern may be understood by the individual primarily in terms of its actual components. On the other hand, it may be understood primarily in terms of the underlying purpose or purposes that it serves to promote. For example, imagine someone who regularly does push-ups whenever a convenient opportunity presents itself. On the one hand, he may understand this practice primarily in terms of the physical movements necessary. On the other hand, he may understand it in terms of the underlying purposes the practice serves for him. If he understands it solely in the former way, occasions will arise when he is unsure whether to engage in the practice; that is, whether a "convenient opportunity" has in fact presented itself. If he is aware of the underlying purpose grounding the practice in his own psyche, then such uncertainties would be more easily resolvable. If his primary purpose is one of strengthening his muscles, lungs and heart, and he is aware of this, then the concept of convenient opportunity will tend to mean one thing. On the other hand, if the conscious purpose is calming himself in times of anxi-

ety, then the concept of convenient opportunity will tend to mean something else.

Two conceptions of a normative rule emerge from this distinction between modes of conscious awareness of a pattern. The first mode of awareness gives rise to the conception of rules as somehow applying themselves. Rules are disembodied; they apply themselves and we have only to follow their lead. The second mode of awareness suggests a very different understanding of normative rules. Here the central fact is not the rule but the purpose. The underlying objective or aim served by a rule is kept in the forefront of attention. The mechanics of the rule are seen as devices for working toward an objective. In the first mode of awareness rules are seen as the primary phenomenon; purposes as secondary. In the second mode, it is purposes that are primary.¹⁰⁷

A related point concerns divergent attitudes toward the ideal formulation of a normative rule. The first approach tends to see the ideal form of a rule as one setting forth explicitly all possible sets of circumstances that would constitute proper occasions for application of the rule. The latter approach does not concern itself with such matters; it is enough to have the central purpose in mind. The contingent circumstances will take care of themselves when evaluated in terms of the underlying objective.

An alternative way of making this contrast is by distinguishing between code moralities and moralities of purpose. A code morality conceives of the moral life as primarily a matter of following rules. A morality of purpose understands moral existence as a matter of pursuing objectives. On the latter view, rules and principles are of little epistemological help except as convenient rules of thumb for situations in which there is little or no time for the kind of reflection needed carefully to determine how to pursue a given purpose in a concrete case.

One who leans toward a code view of morality will tend to understand the legal system in the same terms, *i.e.*, will tend to understand a set of laws as a set of rules whose proper range of application is somehow already contained within themselves. In contrast, one who understands moral choice in terms of underlying purposes will tend to understand the legal system in the same teleological way. A code-oriented jurist will tend to put the question

107. I do not mean to suggest that the mechanical following of a rule is behavior without purpose. The point is that the underlying purpose is likely to differ from that of one following a rule with a teleological awareness.

of interpretation in terms such as, "How does rule Z apply in this situation?" A purpose-oriented jurist will tend to express the issue of interpretation differently: "Given that X is the most plausible and justifiable objective to be served by rule A, how should I interpret A in this situation so as to best promote X?"¹⁰⁸

Now consider the case of a pattern of action that is shared by a group of persons. Understanding the nature of this phenomenon is crucial to any understanding of legal reasoning. In accordance with the earlier analysis, one would expect that shared patterns, like individual patterns, are explicable on the basis of underlying purposes those patterns are believed to serve. But one of the difficulties is in ascertaining the purposes pursued by a commonly shared pattern. Whose purposes should one consider? Should one assume that all of those who share a particular pattern of action share a single purpose?

Here it is important to distinguish the public aspect of a pattern of activity from its underlying objective. Persons may share the public dimension of a pattern without sharing an underlying purpose. For example, consider two individuals who customarily read poetry for one-half hour each day. One person does this with the intention of deepening the experience of reality; the other is trying to impress someone. Here there would be an identity of public practice but a nonidentity of purpose. Of course, one could say that in some sense two different patterns of action are present in such a case, and that part of what it is to characterize a pattern of action is specification of the underlying intentions. But because I want to bring out the possibility of individuals' sharing some, but not all, dimensions of a practice, I choose to follow the former usage.

This consideration suggests a fundamental feature of a complex social order such as ours. Participants in such an order may be pursuing different life-purposes and radically different world views. But as bound together in a common social enterprise they necessarily share something, namely the public dimensions of certain practices and patterns of action. But they share these with possibly very different motivations.

108. For a helpful discussion of this distinction, see R. TAYLOR, *GOOD AND EVIL* 161-85 (1970). The contrast between code moralities and moralities of purpose is also relevant to the debate between the act and rule-utilitarians and to the issue of intuitionism in ethics. For a discussion of code moralities, see J. SMART & B. WILLIAMS, *UTILITARIANISM* 9-12 (1973). On the subject of moralities of purpose, see W. FRANKENA, *supra* note 99, at 16-17.

In a complex society all participants probably will rarely engage in any practice with a single objective. But it is also probably true that for a pattern to survive it must be used by a substantial proportion of those engaging in a pattern with similar motivations.

What does this imply regarding the primary purpose motivating a given pattern of action? If it is unusual for any particular practice to be engaged in by all with a single objective, then in what sense can we even seek an underlying objective? On one level the answer can only be that we must explicate all the underlying motivations supporting the pattern. One could still single out for special scrutiny purposes that seem to be shared by the largest proportion of participants, but until one understands the other purposes constituting motivation for compliance with the practice there is a sense in which one does not yet truly understand the practice. And this is only what one should expect, given the fact that human acts and institutions (including practices) are teleological in nature and hence can be understood only in terms of underlying purposes.

From this it follows, in turn, that the product of such an analysis would be a set of explanatory practical arguments, a set of descriptive explanations of the public dimension of the pattern in terms of the varying underlying teleological considerations. In addition, each such explanatory argument could be transformed into an evaluative argument. And each of the latter are subject to critical examination with respect to both the intermediate and ultimate premises. This process in turn leads to reflection about the ultimate moral justifiability of the pattern and about the question of whether the pattern might better be replaced with another. Thus, the process of moral evaluation of patterns leads to reflection about the future direction of the social order itself.

Some fundamental propositions about life in a social order can now be made. A society is definable in terms of its set of practices and patterns of action. These patterns range from relatively simple practices, such as excusing oneself when sneezing, to complex patterns such as enacting legislation, proving mathematical theorems, and meditating on the explanation for there being anything at all.¹⁰⁹ A large proportion of one's waking moments are occu-

109. For a very influential essay on the importance for human life of meditation on the ground of contingent being, see M. HEIDEGGER, *What is Metaphysics?*, in *EXISTENCE AND BEING* 325-61 (W. Brock ed. 1949).

pied with patterns. Thus, the nature of the patterns tending to define a social order is an important question.

A member of a complex social order is continually faced with moral choices concerning the available patterns that comprise that order. One is faced with moral questions concerning every use of personal time. Social patterns bid for personal time; to engage in a pattern of practice is a mode of using time. With respect to any particular pattern one has, in principle, two kinds of moral choices. First, the question arises whether one should participate in the pattern at all. Second, there is the question as to how one should participate in the patterns one selects. The second kind of choice involves such questions as the motivation with which one should participate, the kinds of circumstances in which one should find the pattern appropriate, and the attitude one should try to convey to others about one's evaluation of the practice. Such moral questions are necessarily resolved by action in one way or another by every participant in a social order, whether or not one has consciously faced them.

As Heidegger has argued,¹¹⁰ an individual is definable in terms of the ultimate purposes he pursues. This complex of ultimate purposes constitutes a fundamental project¹¹¹ in terms of which the agent organizes action, thought, feeling, and experience.¹¹² Such a fundamental project incorporates a particular understanding of reality (a metaphysical world view) and a particular set of emotional responses to reality as thus perceived.¹¹³ The relevant point for our purposes is that one tends to interpret all phenomena, including one's own experiences, in terms of one's fundamental project.

This tendency also includes the tendency to so interpret social norms and patterns. Given any particular pattern, one tends to understand it in light of one's own fundamental orientation toward the world. This understanding will express itself in at least two dimensions. First, if one chooses to participate in a pattern

110. See M. HEIDEGGER, *supra* note 93, at §§ 14-18.

111. See J. SARTRE, *BEING AND NOTHINGNESS* 433-556 (H. Barnes trans. 1956).

112. It might be asked how fundamental projects could ever differ among themselves. For, is it not the natural law position that all persons seek the ultimate human good? This may be true, but the point is that not everyone seeks the ultimate good in the same manner. A fundamental project is the way in which an individual goes about seeking intrinsic good. One has only to contrast fundamental projects such as greed, combat, accumulating wealth, and sainthood to see that great variation is possible.

113. Of course, in most instances the fundamental project will be below the level of conscious awareness.

one will do so with a motivation consistent with one's own fundamental project. This means, in part, that the explanatory practical argument that would lay bare the teleological structure of that participation will cohere with the fundamental project of the individual. Second, one will tend morally to evaluate patterns in accordance with one's own fundamental project; that is, one's response to the alternative evaluative arguments that could be offered in support of the practice will tend to cohere with one's fundamental project.

But one's fundamental project defines the basic mode in which one uses personal time. Hence, one will tend to construe social patterns in light of one's own fundamental modes of using time. One's own fundamental modes of using time constitute one's morality, however. Hence, one inevitably understands social patterns in light of one's own moral understanding.

It follows that reality is ambiguous in the sense that no predetermined meanings are forced upon one. The meaning of a phenomenon for an individual arises out of his fundamental project. Ambiguity is resolved, if at all, only through interaction between phenomenon and fundamental orientation. I do not reject the possibility of the existence of objective truths about the world; but I do reject the suggestion that an objective order of meaning and truth is forced upon us.

What is the nature of a society given the foregoing account of human action? A society is comprised of a class of individuals, each of whom strives to realize his or her potential in terms of his or her fundamental project. This striving expresses itself in modes of using time—in particular, patterns of action. With every discrete act, an individual strengthens certain patterns within himself and weakens others. The power of a pattern increases with repetition. The influence upon an individual by the examples set by others following patterns of their own is also strong. Other things being equal, one tends unconsciously to assimilate patterns that prevail in the social order of which he is a member. Thus, every discrete act taken by an individual bears at least two kinds of causal influence: an interior effect upon his own experience and action, and an exterior effect upon the patterns of others. In short, one way of understanding a social order is to see it as a collective effort to create, reinforce, eliminate, or weaken various practices and patterns of action. A social order is the collective enterprise of creating and sustaining modes of using time. Thus, a social order

must be seen as a collective effort to create a moral order, since modes of using time are modes of moral order.

But this does not mean that a social order is a collective effort to create any particular moral order. From the fact that each member is pursuing a fundamental project, it follows that each is pursuing a vision of the good, *i.e.*, of the intrinsically good human life. But it does not follow that all are pursuing the same vision. What binds us together is the common human enterprise of striving to realize the good; what that good comes to is obviously a matter of conflict. With every discrete act, everyone contributes in some measure to the modes in which time is shaped and directed by the social order. Modes that are strengthened by a discrete act will conflict with modes promoted by those who pursue different understandings of the good.

Thus, to exist is to act. To act is to make moral choices arising from a fundamental project embodying a particular vision of the good. There is no consensus with respect to ultimate good. Hence, action within a social order is a matter of conflict. Concrete action necessarily contributes to the strengthening of certain patterns and the weakening of others. The total social outcome is beyond the control of any single participant and is the product of conflicting visions of the good.

Now consider the role of a judge in a complex society. The first fact to notice is that in deciding a case a judge is acting. Hence, the foregoing analysis of human action applies to the activity of deciding cases. In particular, the concepts of explanatory and evaluative arguments apply.

The teleological structure of a judicial decision can be analyzed by an explanatory practical argument. The conclusion of such an argument is the decision reached by the court—the act of resolving the case in a particular way. The remainder of the argument consists of statements concerning relationships between means and ends, and a premise setting out an end experienced as ultimate. Of course, no claim is made that all aspects of the teleological structure of a judicial decision are conscious. But that there is such an explanatory structure is a presupposition of the belief that human action is purposeful.

Imagine an outline of the explanatory practical argument that might be offered by a judge after applying a particular statute in resolution of a case. (For simplicity I shall not put the account into the more formal mode.)

- 1) I have decided X.
- 2) I have decided X because of all the possible ways of interpreting statute Y, I believe X to be the best.
- 3) I think X is the best of the alternative interpretations because I believe it to be most consistent with my moral understanding of what a law expressed in this form of words ought to be attempting.
- 4) The reason I want to choose what I take to be the best possible interpretation of Y is that I want to fulfill my moral obligation as a judge, which obligation includes choosing the best possible interpretations of statutory language.
- 5) I want to fulfill what I take to be my moral obligation as a judge because I believe that the judicial system is potentially a social good and I want to contribute to its effectiveness.
- 6) I want to contribute to the effectiveness of the judicial system because I think such contribution is a useful means of contributing to the formation of social conditions which are either necessary or useful to the attainment of the common (intrinsic) good for all, and I want to do what I can to help bring about such conditions.
- 7) I want to help bring about such conditions because I believe that doing so will, in part, help fulfill my capacity for creating intrinsic good and I want to do what I can to realize that capacity through action.
- 8) I want to do what I can to realize my essential capacities through action because only in this way can I hope to achieve integration.

Of course, this is not a complete teleological analysis of a judicial decision. For one thing, I have ignored the fact that any judicial decision incorporates many subordinate decisions upon which the primary decision is based. For example, as a predicate of the decision about the application of statute Y, the judge may have rejected a claim that such an application would violate the Constitution. This is itself a choice and can be given an explanatory teleological account involving beliefs and desires about the proper interpretation of the Constitution.

Given the appropriate explication of the teleological structure of a judicial decision, one can see how, as before, the explanatory argument is convertible into an evaluative argument by imagining the judge attempting to justify the decision. The ultimate premise is convertible into a statement of belief about an intrinsically desirable end. The intermediate means-ends premises are converti-

ble into statements that the alleged means-end relationships are rationally supportable. And the conclusion is convertible from a choice to a statement that one has a good reason for making that choice.

Thus, a judicial decision is intrinsically a moral decision. A judicial decision is a human act. An act is a mode of using personal time. A mode of using personal time is a moral decision made in accordance with a hierarchy of purposes and desires constituting a fundamental project which itself constitutes a particular vision of the good. These generalizations are applicable to some of the more particular aspects of judicial decisionmaking.

Consider the process by which a court ascertains the facts in a case. It is commonplace that any event can be described in alternative ways. One tends to describe a situation in light of those aspects that one tends to notice, and one tends to take special notice of those aspects relevant to one's own interests. One's own interests, in turn, are shaped by one's own underlying purposes and objectives, and ultimately by one's own fundamental project. Hence, there is a sense in which one's personal vision of the good influences the things one tends to notice and hence the descriptions of events one tends to give.

In what ways does a court's teleological understanding influence its use of the rules applied in resolution of the case? For one thing, the class of rules and principles a court deems relevant for consideration in a case is a function of its own beliefs and purposes concerning the legal system and social order. One cannot read from the facts the rules that should be taken into account. The class of such rules is shaped by the court's fundamental project, since whatever decision is rendered, its teleological structure must be explicable in terms of an explanatory practical argument which in turn will mirror the underlying teleology of the court.

It might be conceded by some that the set of rules that a court deems relevant to the resolution of a case tends to be a function of the court's own teleological orientation. But some may argue that the total class of rules and principles from which a court makes such a selection is not itself a function of the court's own vision of the good. The total matrix of rules and principles is imposed on a court from the outside, so to speak. The total set of legal rules is imposed by the social order; the court's role is simply one of accepting and applying those rules. Furthermore, once a court determines that a particular rule or principle is relevant to the

resolution of a case, its application is beyond the discretion of the judge. Not only are legal rules themselves a product of a social order external to the court, but their interpretation and application is as well.

To see why such objections are mistaken, it is necessary to consider the nature of legal rules themselves and the ways in which they are appropriately used.

A society's system of legal rules is best understood as a subset of its total complex of normative patterns of action. A social order is a complex matrix of normative patterns of action. Most of these are nonlegal in nature. A legal system grows out of underlying nonlegal norms. Thus, the foregoing analysis of nonlegal norms is relevant to an analysis of legal norms.

As with any normative pattern, a legal norm can be understood in two ways. On the one hand, one can approach it on its own literal terms, so to speak. That is, one can try to understand the rule as a directive to take certain action upon the occurrence of certain conditions. One can take a legal rule as a directive to be followed mechanically without attention to underlying purposes motivating the creation of the rule. On the other hand, one can try to understand the application of a rule by reflecting upon the possible objectives that it serves in the social order.

As a human creation, a legal rule is a means for achieving human ends. It follows that genuine understanding of a legal rule requires attention to the underlying purposes the rule is believed to promote. A legal system is a teleological structure, a complex of norms serving human ends.¹¹⁴ To try to understand a legal system in the deontological mode as a set of directives to be followed mechanically without awareness of underlying purposes is an inadequate approach. One can neither properly evaluate or apply legal rules without ascending to a teleological level of analysis. Ascending to the teleological level requires substituting for the picture of a legal system as a set of abstract rules the conception of law as a human activity in which individuals pursue purposes that are shared in some respects and unshared in others.

In this connection, it is helpful to recall the earlier remarks about the contrast between the external or public form of a socially shared pattern of action and its underlying objective. The case of legal norms is similar. No legal norms exist in the abstract;

114. For a recent teleological analysis of the concept of a legal system, see I. JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW* (1980).

rather, there are only skeletal frameworks of norms that require filling out by those who apply these norms in concrete situations.

Consider the case of a legislative rule as applied by a court. A statute consists of words. But no set of words, no matter how detailed or extensive, could suffice automatically to resolve questions of the rule's application. A rule cannot apply itself; it can only be applied by a person. It is a person who applies the rule in a specific situation that determines the meaning of the rule in that situation for that individual. A statute can be only a framework or outline for a rule; it could not be a rule itself. A rule lives only in and through instances of application. A rule has no being outside concrete patterns of action incarnated in the acts of persons guiding their conduct by the norm.¹¹⁵

It is true that the words of a statute delimit to some degree the universe of possible interpretations. Given the dictionary meanings of the terms, there are always some interpretations that could not reasonably be made by a native speaker of the language. (*E.g.*, imagine attempting to apply a rule that an automobile driver must signal before turning so as to find criminally liable a pedestrian who did not signal his intention to leave the sidewalk along a street and turn toward the front door of a house.) On the other hand, there is inevitably a measure of slackness between the words and the world, a slackness that can only be taken up by the active interpretation of a person. Such an active interpretation can be reasonably made only by reflecting upon the purposes served by the statute. It is the underlying objective, as ascertained by a court, that determines whether the words of a statute are appropriately applied in a specific instance.

Assuming that adequate interpretation of a legal rule requires attention to the underlying objectives the rule is believed to promote, how should a court go about doing this, and in what sense does awareness of this process serve to dissolve the picture of courts mechanically applying rules whose content and modes of application are dictated from the outside? At least part of the answer lies in an examination of the process by which a court seeks to ascertain the underlying purposes of a legal norm.

Here, one is tempted to suppose that since there is a sense in which a legal system is a set of norms arising from socially shared

115. For a useful discussion of the consequences of this thesis for the prospects of radical social reform through the law, see *id.* at 109-17.

purposes and objectives, it is such socially shared purposes that impose limitations upon the interpretative discretion of courts.

In a sense, it is true that courts apply rules that the participants in the legal order share, and that such rules arise from underlying purposes. The problem is one of explicating this concept of social sharing. What are the methods available to a court that is to ascertain the underlying objective of a statute? There are basically only two kinds of cases: one in which there is linguistic direction as to purpose, and one in which there is no such direction.

The case of linguistic direction will consist of purposive language in the statute itself. But those charged with the responsibility for applying the rule have only linguistic forms for guidance. As argued above, no form of words can alone suffice for the interpretation of a rule; this holds equally for statements of purpose. The socially shared dimension of a statute is constituted by the form of language used in the statute. To make a concrete interpretation of the rule, one cannot avoid invoking one's own teleological understanding. A linguistic statement of purpose lives only in the concrete instances of its application, and such applications can be made only by individuals who necessarily use their own world views in interpreting such forms of language.

An alternative way to make the point is by noting that the products of socially cooperative activity such as legislative enactments are inherently ambiguous in the same way as are all socially shared patterns of action. A social practice exists only in concrete patterns of action engaged in by persons. To say that a socially shared pattern is fundamentally ambiguous is not a criticism. It is not as if things could be otherwise. A socially shared pattern is ambiguous because that is the essential nature of socially shared patterns, including socially shared statements of purpose.

The need for invoking the court's own teleological understanding in applying a statute becomes even more obvious when no linguistic direction as to statutory purpose is present. Here the court must try to range before itself all of the possible objectives that might be thought to be advanced by this particular formulation. And in most instances, the set of possible objectives will be even larger than for the case of a statute incorporating purposive language.

Thus, given any particular form of language used in a rule, alternative purposes that might be served by that formulation will always exist. Hence, a court cannot avoid choosing among such

alternatives. But it follows that in interpreting a statute a court could not possibly be constrained by any socially shared objective; there are none. In interpreting a statute, all a court has is a form of language, a mere framework for a rule; the rule itself cannot exist outside specific interpretive acts.

It is this inherent ambiguity of any linguistic formulation that accounts for the futility of seeking the legislative "intent" of a statute. The intent of a legislature, even if such an entity existed, would be irrelevant for a court seeking to interpret a statute. It would be irrelevant because it could not possibly be ascertained. What can be ascertained is the public dimension of the norm, namely the form of language. And given any form of language, there will necessarily be alternative teleological orientations with which the words will cohere.¹¹⁶

Given a set of alternative objectives that could account for a statutory form of words, the court will tend to choose that objective that best coheres with its own fundamental orientation. In particular, it will tend to select that purpose that it believes to be the most justifiable purpose that the language of the statute could promote. This tendency is not only inevitable; it is morally justifiable. For, given the intrinsic ambiguity of all public dimensions of norms, there could be no other alternative.

Thus, even at the level at which legal rules are applied, courts necessarily and continually contribute, by their very acts of interpretation, to the shaping of the legal system. With every concrete act of interpretation a court contributes to the evolutionary unfolding of the meaning of that statute. Things could not be otherwise. In one sense, this is a paradigm of discretion. But in another sense there is no discretion, if by that term one means to suggest that the adjudicative process could operate otherwise.

That such complications should surface in the effort to understand the sense in which courts participate in socially shared objectives should not be surprising to one aware of the obscurity of the very concept of a socially shared purpose itself. What is it for two people to share a purpose? In what sense, if any, can any two individuals be certain that they share precisely the same objective?

Part of the difficulty lies in simply understanding what it is for one to have a purpose. Even for relatively simple purposes, such as trying to become a skillful lawyer, there is a sense in which one is

116. For a discussion of the distinction between statutory intent and purpose, see L. CARTER, *REASON IN LAW* 47-103 (1979).

never completely certain about the nature of the purpose ("What exactly is a skillful lawyer?"), and about the steps that might be necessary or useful for the attainment of that purpose. If this is true with respect to objectives such as becoming a skillful lawyer, how much more is it the case for truly complex purposes such as striving to build a social order that will promote justice, or trying to become wise? For purposes like this, one understands the nature of the objective only in the pursuit of it, and since the pursuit of such an objective is unending, complete certainty is unattainable.

If certainty about one's own purposes is unattainable, the problem becomes qualitatively more difficult when it comes to the matter of sharing purposes with others. Here, in the final analysis, all one has to rely upon are external indications of the other's purpose ("public dimensions" of the purpose). Two might agree on a linguistic formulation of a common purpose (*e.g.*, "We ought to work to promote a social order in which the minimum essential needs of all citizens are met."), but nevertheless could be far from certain whether they share an identical objective. The only way in which the participants in a purportedly common purpose can work toward an understanding of each other's intentions is for each to venture interpretations of the common purpose. (*E.g.*, "You say you agree that the minimum essential needs must be met. But does that mean that you would support a measure that provides free medical care for all citizens? That's part of what fulfilling the purpose means to me.") But this illustrates again the fundamental proposition that the process of mutually sharing an objective involves the participants' own teleological frameworks—their fundamental projects.

In addition, this process of mutually offering interpretations of a common purpose tends to modify those subjective interpretations themselves. Each participant in the common enterprise of sharing an objective may tend to modify his own conception of that objective as he comes to understand more of the others' pictures of the shared purpose. However, this process of mutual education could never result in a certainty that two persons shared precisely the same understanding of a purpose, because the only way in which two persons can arrive at mutual clarity about a common purpose is to discuss how the purpose should be instantiated in a specific situation. But there could never be an end to the possible contexts of application. No matter how many hypotheticals have been discussed and agreed upon, it will always be possible to think of another. This does not mean that one could have a purpose

completely articulated in one's own mind, with only the specific applications remaining to be made. Rather, the purpose itself exists only insofar as it is applied.

Thus, purposes are capable of indefinite expansion of meaning. It follows that the same must hold for norms, practices, and rules. But this insight provides yet another reason for rejecting the picture of a legal system as a shared set of abstract principles binding the members of the social order. A norm exists only insofar as is applied in particular contexts by one following the norm. Since there are always an indefinite number of possible contexts of application, two persons could never be certain that they completely agree upon the interpretation of a rule. Hence, it is better to conceive a legal system as a social activity in which participants argue and discuss the infinitely expanding meaning of shared norms on the basis of individually held world views.

These considerations help explain why legal reasoning could not be deductive. Perhaps the primary reason for the common belief that it is deductive is our habit of analyzing judicial decisions in terms of the deductive inference scheme, *modus ponens* (i.e., "If P, and if P implies Q, then Q"). The legal rule relied upon by a court in resolving a case is understood as having the general form, "If such-and-such circumstances obtain then such-and-such legal consequences follow," which in turn has the form, "If P then Q." The facts as found by the court are then seen as the antecedent of the if-then proposition, i.e., as P. The conclusion, Q, then follows deductively. The weakness of this analysis is its superficiality. As argued above, the interesting and controversial aspects of a judicial argument always lie in the possible justifications that could be offered in support of the premises, "If P then Q," and "Q." And such justifications, being necessarily of a teleological nature, could not possibly be deductive. Inference-steps asserting that certain means are a reasonable way of achieving certain ends are inductive, and such steps are an inherent component of teleological arguments.

If a court's teleological understanding of a society and the world play an intrinsic role in the interpretation of a statute, then, a fortiori, it plays an intrinsic role in the modification of common law¹¹⁷ or a reinterpretation of the Constitution. The court will at-

117. A natural law theory of common-law adjudication would be more complicated but similar to that just sketched for the case of statutory interpretation. In common-law adjudication the public dimensions of the norms are constituted of the judicial decisions themselves.

tempt to justify its decision in such cases by appealing to commonly shared principles and purposes, but, as always, the socially shared dimension of the principles and purposes will require to be given concrete content by the individual teleology of the decisionmaker.

Let us now try to determine what the foregoing analysis implies for the question of judicial discretion and adjudicative rationality. To summarize briefly, one must understand a judge as a participant in a social order whose acts share the characteristics possessed by the acts of all members of the order. Human action is inherently teleological. One acts out a basic understanding of the world and the significance of human life. Conjoined with this comprehensive orientation is a fundamental project—a complex of deep purposes the pursuit of which constitutes the meaning of life for the individual. The teleological structure of action can be analyzed with explanatory practical arguments. One's fundamental project may or may not be consistent with the human essence—that complex of deep needs defining the human condition, the fulfillment of which is the only means of attaining any measure of true integration. Philosophical and moral reflection is the sustained effort to contemplate the nature of the human essence and the means for realizing that essence through activity. Evaluative practical arguments can be used to articulate the products of such reflection. The course of moral reflection is often difficult and uncertain; fallibility is of its essence. One's existence tends to express itself through modes and patterns of action—habitual and customary ways of using personal time. Such patterns of action are inherently teleological; they are defined by the subjective purposes and needs by those engaged in the patterns. That is, patterns are tools used by an individual as a means of pursuing his fundamental purposes. A pattern of action is not fully characterized until the subjective matrix of purposes and desires giving rise to it are articulated. The same holds for discrete acts. To act is to take a concrete step toward the sustaining and strengthening of a particular life-world, a particular mode of experience and acting in the world. Each person is continually engaged in the creation of a universe of meaning. This metaphysical and moral creativity expresses itself both through discrete acts and patterns of action. Because one expresses one's mode of existence primarily through the

patterns one lives, reflection upon the nature of these patterns constitutes a vital aspect of philosophical and moral reflection. The heart of such reflection concerns the question of whether the patterns one finds oneself living are adequate means for realizing the human essence. A social order consists of a complex matrix of shared patterns and practices. One should distinguish the public dimensions of a practice that are shareable from those that lie, of necessity, within the subjectivity of the individuals participating in the pattern. No shared patterns exist in the abstract. There are only patterns given incarnations through the lives of persons guiding their actions with those patterns. One's choice of patterns and of the ways in which one instantiates them is influenced by the acts and patterns of others. That is, one's pursuit of the good is inevitably affected by the social consequences flowing from all other individual pursuits of the good. The mediation of such effects may be direct or indirect. Mediation is direct when, for example, one is killed or assaulted by another. Mediation is indirect when one's own fundamental orientation is subjectively influenced by the acts and patterns of others. In such cases the individual is influenced by what he takes to be the fully instantiated act or pattern of the other, that is, by what he takes to be the other's underlying purposes and motivation. The interpretation of a pattern is inherently a matter of an individual acting from within his own teleological orientation toward the world. Each act of interpretation is intrinsically creative; the interpreter cannot avoid striving to incarnate his own metaphysical and moral sense of things. The collective outcome of the social process is beyond the control of any single individual or group. Every participant in the social order should, upon reflection, recognize the teleological nature of his own actions and that of the acts of the other members of society. This means that one should recognize as inevitable the fact that everyone is continually engaged in efforts to create universes of meaning. This state of affairs is chaotic in one sense. But the chaos is not completely unfruitful. It is useful in at least two respects. First, an intrinsic part of realizing the human essence through activity is the seeking of that essence in freedom. But freedom requires the possibility of mistake, of trial and error. Second, since one's own search for intrinsic good is fallible, one ought to welcome the illumination that sometimes comes through the cooperative endeavor to realize intrinsic good. As participants in the social order, judges share all of these characteristics. Their distinction from the rest of us lies in the fact that their political role af-

fords them much greater potential for the shaping of the social order. Because they are responsible for the application of the legal system, judges have the power to shape the content of that system. I have argued that even when a court purports simply to apply a statute, it exercises its own fundamental orientation and project. This teleological creativity also expresses itself on the level of fact-finding, and, a fortiori, on the level of explicitly setting out to modify common law or constitutional doctrines. The question arises, therefore, whether this account of adjudication leaves the resolution of cases and the development of case law entirely to the unfettered discretion of judges. In what sense can one say that the process of adjudication is subject to constraints of rationality at all?

The basis for an answer can be found in the claim that legal reasoning is a form of moral reasoning. I have argued that moral reasoning is teleological reasoning concerning means-ends relationships and the desirability of ends. Moral reasoning arises from our nature as beings who seek to realize the good through action. Our striving to realize the good arises, in turn, from a deep complex of needs and desires constituting the human essence. This is not to claim that one cannot fail to realize the good; obviously one can. The claim is simply that we share a human essence and that we intuitively believe that this essence, if realized through appropriate modes of action, will yield well-being.

If moral reasoning is potentially rational, so is legal reasoning. The question arises whether moral reasoning is potentially rational. I have argued that it is. In summary, the argument is as follows. There is a distinction between well-being (integration) and its absence. One perceives the distinction through the very act of living. Within limits, one can also perceive gradations of well-being and its absence. Through the process of living one becomes aware that certain modes of activity yield greater integration than others. This observation leads to the conviction that within oneself is a human essence—a complex of needs and desires the fulfillment of which, through certain modes of activity, yields whatever measure of integration one can hope to achieve. Upon reflection, one moves to the generalization that the essence within oneself is common to all persons and that there is a common human essence. The only available means for testing claims about the nature of this essence or about appropriate means for realizing it is experience. That is, the only available method for confirming or disconfirming an assertion about the human essence is living it out

experimentally and verifying directly whether a measure of integration results. Of course, one does not have to experiment personally with all possible modes of activity. To observe the results of experiments undertaken by others, either in the present or in the past, often is sufficient. But even in these cases the ultimate touchstone has to be someone's personal experience. Not only do we have a method for confirming or disconfirming claims about the human essence, but, within limits, we can communicate with each other about such claims and about the consequences of living them out experimentally. And, within limits, we can come to mutual agreement about the measure of integration, or its absence, resulting from such trials. But if all of this is true, we have an objective mode of reasoning: that is, we have a mode of inference in which the standards for evaluating arguments cast in that mode are sufficiently shared and understood by the participants to allow for at least the possibility of informed consensus as to the validity of particular claims and arguments. Hence, moral reasoning is potentially rational. And because legal reasoning is a form of moral reasoning, legal reasoning is potentially rational as well.

In addition, special characteristics of the legal process make a consensus of the informed participants somewhat easier to achieve than is the case in nonlegal moral debate. This is due in part to the fact that the participants in a legal system often find themselves agreeing on a specific objective for purposes of an immediate issue, and debating the lower-level question of the best means for achieving that shared objective. For example, if the issue presented in a case is the proper interpretation of a specific statute, a panel of judges might well agree upon a certain formulation of the proper statutory objectives, for the purposes of that case thereby reducing the level of debate to a choice of that interpretation that best realizes the shared objective in that context. This kind of partial consensus is often lacking in nonlegal moral discussion, where there is a tendency to move quickly to debate about the deepest foundations of morality itself.

This special feature of legal argument is related to another characteristic. In moral discussion it is sometimes possible for two persons to agree upon a specific objective, and even upon the best means for pursuing it, without being able to agree upon the deeper teleological foundations for the shared objective itself. Thus, they may both agree commonly to pursue objective B by means of A, but one person may be seeking B because he believes it to be a means of attaining C, while the other seeks B because he thinks it

to be a means of attaining D, and both may believe that C and D are incompatible. An alternative way of making this point is by observing that two or more explanatory practical arguments may sometimes share a common stem part of the way up from the choice agreed upon, but differ radically in the upper reaches of the teleological structure. Whether this kind of divergence will hinder or prevent cooperation depends in part upon whether the participants can pursue the shared objective in good conscience, recognizing the possibility of ultimate disagreement over the deeper foundations of the objective, but believing that under the circumstances total consensus is not morally required. The legal process provides a context in which such limited consensus may be pursued in good faith. This is due in part to the scarcity of time in which the legal issues may be resolved and in part to our recognition of the difficulty of reaching agreement on ultimate moral foundations.

What does the natural law theory of legal reasoning imply with respect to the question whether legal issues have uniquely correct solutions? One might suppose that because I have argued for the ultimate objectivity of moral judgment I am forced to conclude that there are uniquely correct legal solutions. And, in a sense, a natural law theorist must believe in uniquely correct answers to moral questions. But on the other hand, one must remember the ever-present possibility of human error; as beings seeking moral knowledge we are fallible. Moral choice is always made under conditions of obscurity and uncertainty, whether the choice concerns a selection of means for achieving a given end or a selection of an intrinsically desirable end. Rare are the occasions when one can say with a justified absolute conviction that one sees the moral truth about something. It is important to believe in objective moral truth because that is what we find ourselves continually working toward. But it is part of a well-founded skepticism about our own powers of moral insight to be tolerant of disagreement.

This leaves the natural law theorist with a theory of legal reasoning that admits, for most legal questions, the possibility of a range of acceptable solutions. Given the pervasive uncertainty and unclarity about the nature of intrinsic good and about the best means of realizing that good in the ambiguous conditions of history, most legal issues will reasonably admit of a variety of possible solutions. Of course, there will always be some kind of limitation or outer boundary on the class of permissible solutions. But that outer boundary will never be marked with bright colors and

the methods we use to locate it will vary from case to case. Nevertheless, I believe that this conception of legal reasoning captures the intuitions of the ordinary lawyer to a greater degree than either the positivist conception or Dworkin's approach.

IV. CONCLUSION

Does a natural law theory help to allay the fears of those unsettled by the idea that judges exercise creative moral discretion both in the formulation and application of legal rules? I think that such anxieties are rooted in an inadequate conception of the nature of a legal system, and that when the latter is dissolved, the anxieties will also disappear. I do not mean to suggest that there is no legitimate place for anxiety about the workings of the legal system, only that these particular anxieties are misplaced. If a legal system is understood primarily as an abstract set of rules, perhaps such anxiety is well-founded, because the model is that of an axiom system for a branch of logic or mathematics, and the rules of such formalized systems do not seem to allow for discretion in interpretation and application. (Even here, however, Wittgenstein had well-known doubts.)¹¹⁸ But if a legal system is seen primarily as a mode of human activity rather than as a set of abstract rules, a different conclusion suggests itself. I have argued that a legal system is primarily a teleological human enterprise in which the participants reason and debate about means-ends relationships and about the intrinsic desirability of purposes. In placing a citizen in the role of judge, the social order is not assigning him the task of acting as a mouthpiece for logically coerced dictates of an abstract axiom system. It does not do this because it could not; the intrinsic nature of action-guiding rules prevents it. Rather, in placing a citizen in the role of judge, the society assigns him both the privilege and responsibility of exercising his best moral judgment concerning means and ends. Rules exist only as concrete acts of interpretation. Rules are not the primary legal phenomenon. The basic reality is the teleological activity of interpretation and formulation engaged in by those given adjudicative powers. It could not be otherwise. The better course would be to acknowledge openly the necessity of creative discretion in the service of moral ends, and to focus concern upon the need for thoughtful allocation of adjudicative power

118. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 185-242 (3d ed. G. Anscombe trans. 1958).

and upon the importance of deepening the general level of legal discussion.

The natural law approach outlined here suggests that judges also have legislative power. Consider again the case of statutory interpretation. In enacting a statute, a legislature can set out a form of language; it must leave the interpretation and application of the language to courts and to lawyers and ordinary citizens who must try to interpret the words without recourse to litigation. But this is implicitly an assignment of the creative powers of a legislative nature. To the extent that a rule exists only in interpretation and to the extent that courts are responsible for such interpretation, courts have legislative powers. And this assignment of legislative power is one in which all citizens share in the virtue of participating in a constitutional order that allocates adjudicative power to courts.

As argued previously, in exercising such legislative powers courts necessarily use moral reasoning. Here the natural law approach agrees with Dworkin. In exercising adjudicative power, a court is enforcing legal rights despite the fact that it is also using moral reasoning. This is so because the political role in which judges are placed by the social order requires moral judgment and reasoning. Exercising moral judgment is what it is to apply the law.

The concept of moral reasoning as defined in natural law theory differs from that used by Dworkin, however. For Dworkin, moral reasoning is the drawing of inferences from conventionally shared moral principles and values; ultimately Dworkin seems committed to conventionalism as a theory of moral truth. For the natural law theorist, moral reasoning is inferential reflection about the objective nature of intrinsic good and about appropriate methods for realizing such good. Both analyses have as a consequence the proposition that legal rights are ultimately based upon moral values. But for Dworkin, those ultimate moral values are whatever values the society happens to share. For natural law theory, they are those ends which, in the very nature of things, are intrinsically desirable.

The natural law theory articulated here also rejects Dworkin's distinction between institutional and individual morality. It is true that a moral purpose held by a single individual is different from one that is shared by a group of persons. But, as argued, any shared objective or norm is essentially indeterminate, requiring completion by interpretive acts, and these acts can only be sup-

plied by individuals, not by the community as a whole. Hence, no bright line can be drawn between community and personal morality.

According to Dworkin, the primary feature of a legal system is its complex of abstract moral principles. His assumption is that a deontological analysis of practical reasoning is correct. On the other hand, the natural law analysis attempted here posits the concrete activity of teleological reasoning as the primary feature of a legal system. One of the virtues of a natural law approach is its ability to account for the assumption that legal arguments can be ranked in terms of degrees of strength without appealing to the useless metaphor of weight. For the teleologist it is not principles that are primary but ends. Therefore, one need not worry about the hopeless task of assigning "weights" to propositions. One's task is rather to debate the desirability of ends and the appropriateness of alternative means to those ends.

The theory advanced here is consistent with Dworkin's theory in rejecting the positivist's concept of a social rule of recognition, but for different reasons. Dworkin rejects the theory because he thinks it cannot allow for the presence within the system of moral principles whose origin does not lie in judicial decisions or legislative enactments but rather in a "sense of appropriateness" developing within the community over time. On the other hand, a natural law analysis rejects the theory because it assumes too facile a distinction between intersubjective verification procedures, which enables the positivist to identify the "law," and the exercise of judicial discretion. If every interpretive act necessarily involves moral creativity, then such a distinction cannot be relied on.

Is adjudication as understood here a principled process? Do courts have discretion in the positivistic sense? If by discretion one means freedom from binding authority as embodied in datable political events such as judicial decisions and legislative enactments, then courts do have discretion. But on the other hand, if legal reasoning is a form of moral reasoning, and if the latter is, in principle, objective, then courts do not have discretion and are morally obligated to make principled, that is, morally justifiable, decisions. Such objectivity does not flow deductively from abstract principles conventionally developed over time by the community's "sense of appropriateness," but rather from the fact that there is an objective order of intrinsic good and the fact that it is, in principle, possible for a community to grow in knowledge both of the nature of this good and of appropriate means for realizing it.

